MESSRS TAI CHOI YU & CO, ADVOCATES v. TING SIE CHUNG

COURT OF APPEAL, KUCHING
ROHANA YUSUF JCA
IDRUS HARUN JCA
MARY LIM JCA
[CIVIL APPEAL NO: Q-02(W)-1909-11-2015]
19 JUNE 2017

CIVIL PROCEDURE: *Pleadings – Counterclaim – Counterclaim arose following claim – Statement of claim struck out – Whether court could proceed with trial for counterclaim when statement of claim had been struck out – Whether counterclaim separate and independent action – Rules of Court 2012, O. 15 r. 2(2)*

The appellant, an advocate and solicitor, commenced an action against the respondent at the High Court, claiming for payment for legal services and works rendered. The respondent filed his statement of defence ('SOD') and counterclaim to which the appellant filed the reply and defence to the counterclaim. Both the appellant and the respondent later amended their respective statement of claim ('SOC'), SOD and counterclaim. The respondent applied to strike out the appellant's action and the same was dismissed by the High Court. Dissatisfied, the respondent appealed against the decision at the Court of Appeal. The appeal was allowed and the appellant's action was struck out. When the respondent's counterclaim came on for trial before the High Court, the appellant, by way of an oral application, raised a preliminary issue for determination, namely, whether the court could proceed with the amended counterclaim when the appellant's amended SOC had been struck out by the Court of Appeal. In dismissing the appellant's oral application, the Judicial Commissioner found that (i) what was struck out by the Court of Appeal was the appellant's SOC and it would be wrong to suggest that the pleading, which also comprised the respondent's defence and counterclaim followed by the appellant's reply and defence to the counterclaim, had also been struck out; (ii) the respondent's counterclaim, which was a separate and independent action, could proceed to trial notwithstanding that judgment was given for the appellant in the action; and (iii) O. 15 r. 2 of the Rules of Court 2012 ('the ROC') shall apply to a counterclaim as if the counterclaim was a separate action and as if the person making the counterclaim was the plaintiff and the person against whom it was made a defendant. Hence, the present appeal.

Held (dismissing appeal)
Per Idrus Harun JCA delivering the judgment of the court:

(1) There was no dispute that the respondent's action before the High Court was a counterclaim. The relevant provisions which deal with a counterclaim are found in O. 15 r. 2 of the ROC. Based on the said provisions, the respondent's counterclaim could proceed notwithstanding that the appellant's action was struck out. The

counterclaim itself, being a statutory creation, is in law treated as a separate and independent action disconnected from the plaintiff's action. A counterclaim does not come to an end in consequence of the plaintiff's decision in discontinuing the action or the dismissal of the plaintiff's action by court, as with the present case. (paras 5 & 9)

(2) It would be wrong to suggest that the pleadings, which also consisted of the respondent's defence and counterclaim, had also been struck out. The fact remained that the effect of the Court of Appeal's order when it allowed the appeal was that it was only the appellant's SOC that was struck out and not the respondent's counterclaim as well. Had the Court of Appeal intended the counterclaim to be struck out, it would have specifically ordered so when the appeal was allowed. (paras 10 & 11)

Bahasa Malaysia *Headnotes*

Perayu, seorang peguam bela dan peguam cara, memulakan tindakan terhadap responden di Mahkamah Tinggi, menuntut bayaran bagi perkhidmatan dan kerja-kerja guaman yang diberi dan dijalankan. Responden memfailkan penyata pembelaan ('SOD') dan tuntutan balas dan perayu memfailkan balasan dan pembelaan terhadap tuntutan balas tersebut. Perayu dan responden seterusnya meminda penyata tuntutan ('SOC'), SOD dan tuntutan balas. Responden memohon membatalkan tindakan perayu dan ini ditolak oleh Mahkamah Tinggi. Tidak berpuas hati, responden merayu terhadap keputusan ini di Mahkamah Rayuan. Rayuan dibenarkan dan tindakan perayu dibatalkan. Apabila perbicaraan tuntutan balas responden di Mahkamah Tinggi bermula, perayu, melalui permohonan lisan, membangkitkan isu awalan bagi pemutusan iaitu sama ada mahkamah boleh meneruskan dengan tuntutan balas terpinda sedangkan SOC terpinda perayu dibatalkan oleh Mahkamah Rayuan. Dalam menolak permohonan lisan perayu, Pesuruhjaya Kehakiman memutuskan (i) yang dibatalkan oleh Mahkamah Rayuan adalah SOC perayu dan adalah salah untuk menyatakan bahawa pliding tersebut, yang juga mengandungi pembelaan dan tuntutan balas responden diikuti balasan dan pembelaan perayu terhadap tuntutan balas, turut dibatalkan; (ii) tuntutan balas responden, satu tindakan asing dan bebas, boleh diteruskan dengan perbicaraan meskipun penghakiman memihak pada perayu dalam tindakan tersebut; dan (iii) A. 15 k. 2 Kaedah-Kaedah Mahkamah 2012 ('KKM') terpakai pada tuntutan balas jika tuntutan balas tersebut adalah tindakan asing dan seolah-seolah pihak yang membuat tuntutan balas adalah plaintif dan pihak yang terhadapnya tuntutan balas tersebut dibuat adalah defendan. Maka timbul rayuan ini.

Diputuskan (menolak rayuan)
Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Tidak dipertikai bahawa tindakan responden di Mahkamah Tinggi adalah satu tuntutan balas. Peruntukan-peruntukan relevan yang menangani tuntutan balas dinyatakan dalam A. 15 k. 2 KKM.

Berdasarkan peruntukan-peruntukan tersebut, tuntutan balas responden boleh diteruskan walaupun tindakan perayu telah dibatalkan. Tuntutan balas itu sendiri, satu rekaan statutori, dianggap sebagai tindakan asing dan bebas yang tiada kaitan dengan tindakan plaintif, bawah undang-undang. Tuntutan balas tidak berakhir akibat keputusan plaintif untuk tidak meneruskan tindakan atau penolakan tindakan plaintif oleh mahkamah, seperti dalam kes ini.

(2) Adalah salah untuk menyatakan bahawa pliding tersebut, yang juga mengandungi pembelaan dan tuntutan balas responden, telah dibatalkan. Fakta kekal bahawa kesan perintah Mahkamah Rayuan, apabila menolak rayuan tersebut, adalah hanya SOC perayu yang dibatalkan dan bukan tuntutan balas responden juga. Jika Mahkamah Rayuan berniat membatalkan tuntutan balas, Mahkamah Rayuan pasti mengeluarkan perintah khusus apabila rayuan dibenarkan.

Case(s) referred to:
Amon v. Bobbett (1889) 22 QBD 543 ***(refd)***
Goh Hock Hai v. EON Bank Bhd [2010] 1 LNS 1357 HC ***(refd)***
Levi v. The Anglo-Continental Gold Reefs of Rhodesia, Limited. (Taylor, Third Party) [1902] 2 KB 481 ***(refd)***
McGowan and Another v. Middleton (1883) 11 QBD 464 ***(refd)***
Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd [1985] 1 CLJ 62; [1985] CLJ (Rep) 242 FC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 15 r. 2(1), (2)

For the appellant - Tai Choi Yu; M/s Tai Choi Yu & Co, Advocs
For the respondent - Henry Ling; M/s Ting & Ting Advocs

[Editor's note: For the High Court judgment, please see Messrs Tai Choi Yu & Co v. Ting Sie Chung [2015] 1 LNS 990 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Idrus Harun JCA:

[1] The appellant commenced a legal action against the respondent by way of a writ of summons and statement of claim in suit no. MYY-22-15-7-2013 (the action) claiming, *inter alia,* for payment of the sum of RM1,198,036.05 for legal services and works it had rendered to the respondent. The respondent filed the statement of defence and counterclaim with respect to which the appellant filed the reply and defence to the counterclaim. Both appellant and respondent thereafter amended their statement of claim and statement of defence and counterclaim respectively. Subsequently, the respondent applied to strike out the appellant's action which application the

High Court had dismissed on 24 December 2013. The respondent appealed against the decision to this court. The appeal was allowed and the appellant's action was struck out on 14 August 2014. No detailed reasons or grounds for the decision were delivered by the Court of Appeal despite allowing the appeal. The appellant's leave to appeal was also refused by the Federal Court. The counterclaim proceeded and came on for trial before the High Court on 24 August 2015. On that day however, the appellant, by way of an oral application had raised a preliminary issue for determination of the High Court. The issue that was raised was whether the court could proceed with the amended counterclaim when the appellant's amended statement of claim had been struck out by the Court of Appeal on 14 August 2014. On 8 October 2015, the learned Judicial Commissioner dismissed the appellant's oral application for determination on the preliminary issue. The appeal before this court is against the decision of the learned Judicial Commissioner in dismissing the said oral application.

[2] Before stating the grounds of decision of the High Court, as a convenient starting point, it is necessary to set out briefly the material facts gleaned from the respondent's counterclaim. The appellant was an advocate and solicitor of the respondent. It is alleged by the respondent that the appellant has breached or otherwise failed to perform the obligations expressed or implied, with the required skill and as expected from an advocate and solicitor's contractual duty to ensure that the respondent's interest is taken care of and amply protected by proper means. In the alternative, the respondent alleges that the appellant was negligent in failing to exercise his professional skill and care as expected of him which the respondent had relied on him. In consequence thereof, the respondent avers, he had suffered special and general damages as a result of which he claims, *inter alia*, for special damages in the total sum of RM7,476,719.90.

[3] The learned judge in dismissing the oral application stated that what was struck out by the Court of Appeal was the appellant's statement of claim and that it would therefore be wrong to suggest that the pleading which also comprised the respondent's defence and counterclaim followed by the appellant's reply and defence to the counterclaim had also been struck out. On trial is the respondent's counterclaim which is a separate and independent action. The counterclaim could proceed to trial notwithstanding that judgment was given for the appellant in the action or that the action was stayed, discontinued or dismissed. The learned judge cited O. 15 r. 2(1) of the Rules of Court 2012 which by virtue of r. 2(2) shall apply to a counterclaim as if the counterclaim is a separate action and as if the person making the counterclaim is the plaintiff and the person against whom it is made a defendant.

[4] On the contrary, we had been called upon by the appellant to judge the merits of the grounds of this appeal which in substance can neatly be summarised as follows:

(a) when an action is ordered to be struck out by the Court of Appeal with the "appeal is allowed" in accordance with the notice of appeal and the notice of application in encl. 32 to strike out the writ of summons and statement of claim, it means the whole action is struck out including the defence, counterclaim, reply and rejoinder and therefore the counterclaim therein cannot exist or cannot proceed for hearing without the action because the action no longer exists as it has been struck out;

(b) the High Court's ruling interpreted the said Court of Appeal's order dated 14 August 2014 to mean that it is the appellant's claim which is struck out and not the action and therefore the action has not been struck out and the counterclaim can proceed for hearing;

(c) the said Court of Appeal's order only states that the "appeal is allowed" and it did not expressly state, that the appellant's claim be struck out and further the notice of application in encl. 32 expressly states that "the plaintiff's action" to be struck out;

(d) in order for the said High Court's ruling to proceed with the hearing of the counterclaim be accepted as the correct construction and interpretation it is necessary to set aside the said Court of Appeal's order or it is necessary to amend the said Court of Appeal's order to state clearly and unambiguously that it is the appellant's claim that is dismissed (and not struck out) whereupon the counterclaim may proceed for hearing in the action; and

(e) the refusal of the judges of the said Court of Appeal to write the grounds of judgment on the said Court of Appeal's order will make it impossible to arrive at an objective decision as to whether it was the intention of the said Court of Appeal to strike out the appellant's action or to dismiss the appellant's claim, any decision without the grounds of decision or will be highly subjective, partial and bias.

[5] As it presently stands, there is no dispute that the respondent's action before the High Court is a counterclaim. The relevant statutory provisions which deal with a counterclaim are found in O. 15 r. 2 of the Rules of Court 2012. It is instructive to quote O. 15 r. 2 in full:

> Counterclaim against plaintiff (O. 15 r. 2)
>
> 2.(1) Subject to rule 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and where he does so he shall add the counterclaim to his defence.

> **(2) Rule 1 shall apply in relation to a counterclaim as if the counterclaim were a separate action** and as if the person making the counterclaim were the plaintiff and the person against whom it is made a defendant.
>
> **(3) A counterclaim may be proceeded with notwithstanding that judgment is given for the plaintiff in the action or that the action is stayed, discontinued or dismissed.**
>
> (4) Where a defendant establishes a counterclaim against the claim of the plaintiff and there is a balance in favour of one of the parties, the Court may give judgment for the balance, so, however, that this provision shall not be taken as affecting the Court's discretion with respect to costs. (emphasis added)

There is without question that, based on the above provisions, the respondent's counterclaim can be proceeded with notwithstanding that the appellant's action is struck out. In effect, the counterclaim herein itself being a statutory creation, is in law treated as a separate and independent action disconnected from the plaintiff's action.

[6] The status of a counterclaim is well-explained by the Federal Court in *Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd* [1985] 1 CLJ 62; [1985] CLJ (Rep) 242; [1985] 1 MLJ 157 whereby it was held that a counterclaim is a separate and independent action by the defendant. Salleh Abas LP concluded at p. 248 (CLJ); p. 161 (MLJ):

> ... Thus, to all intents and purposes **a counterclaim is a separate and independent action by the defendant**, which the law allows to be joined to the plaintiff's action in order to avoid multiplicity or circuity of suits. Like set-off, a counterclaim is also the creation of Statutes. (emphasis added)

The decision of *Permodalan Plantations Sdn Bhd, supra,* was applied in *Goh Hock Hai v. EON Bank Bhd* [2010] 1 LNS 1357; [2011] 3 MLJ 189 when it was held at p. 203 that:

> It is trite that the defendant is entitled to bring the counterclaim against the plaintiff in the proceedings herein having regard to O. 15 r. 2 of the RHC and in order to avoid multiplicity or circuitry of suits.

[7] In *McGowan and Another v. Middleton* (1883) 11 QBD 464, it was argued for the plaintiff that a counterclaim was only a defence to the plaintiff's claim, and was not a cross-action, and therefore, that when the action was discontinued the counterclaim also fell to the ground but for the defendant it was contended that a counterclaim was in truth a cross-action; but at all events, if it was not a cross-action, it was to be treated as if it were a cross-action, and that the discontinuance of the action by the plaintiffs did not put an end to the defendant's right in respect of the counterclaim. The English Court of Appeal at p. 464 in the headnote held:

> By discontinuing an action after a counter-claim has been delivered, a plaintiff cannot put an end to it so as to prevent the defendant from enforcing against him the causes of action contained in the counter-claim.

Bowen L.J. in the above *McGowan* case said this at p. 473:

> In the present case the defendant sets up a claim for independent relief, and the plaintiffs contend that after the discontinuance that independent relief must be obtained by issuing a writ of summons in an independent action. The defendant replies that it is not true to say that because the action brought by the plaintiff ceases, the counter-claim also ceases. In a case like this metaphor ought not to be used, and it is misleading to talk about an action "dying" such terms give rise to error when they are applied to the exposition of legal principles. .... *The order provides that the plaintiff may "discontinue his action", but a counter-claim is not part of the plaintiff's action and cannot be so treated. But even if the words "his action" be read as "the action", the result is the same; a plaintiff can deal only with his own case. He cannot touch that to which legislation has given the effect of a statement of claim in a cross-action*. (emphasis added)

[8] Six years after *McGowan*, the English Court of Appeal in *Amon v. Bobbett* (1889) 22 QBD 543, held (see headnote) that counterclaim must be treated as independent actions. Bowen LJ on the question whether a plaintiff who was met by a counterclaim was at liberty by discontinuing his own claim to put an end to the counterclaim held this at p. 548:

> A counter-claim is therefore to be treated, for all purposes for which justice requires it to be so treated, as an independent action, and it is necessary for justice to be done ..., to consider it as not being part of the action, but as being disconnected from it.

To quote a passage from the judgment of the case of *Levi v. The Anglo-Continental Gold Reefs of Rhodesia, Limited. (Taylor, Third Party)* [1902] 2 KB 481 on this point in which Mathew LJ said at p. 483:

> A counter-claim is a means of disposing, in the action in which it is raised, of a dispute between the parties which would otherwise have to be the subject of a separate action, and it is treated throughout the rules as if it were a cross-action.

[9] The law must therefore be taken to be well-settled that by O. 15 r. 2 of the Rules of Court 2012 and based on the above authorities, a counterclaim is treated as a separate and independent action which does not come to an end in consequence of the plaintiff's decision in discontinuing the action or the dismissal of the plaintiff's action by the court as with the present case. It is clear in the case authorities cited above which represent the law as long as more than 130 years ago that a counterclaim is an independent action and this well-established principle, we accept as sufficient to support the finding of the learned judge below in para. 15 of the grounds of decision in which His Lordship correctly said:

> A counterclaim is a separate and independent action. It is a time-saving device and is an approach that has been lauded by many practitioners.

[10] We must proceed upon the words clearly expressed by the learned judge in his decision at para. 7 that it is the appellant's statement of claim that was struck out by the Court of Appeal. The learned judge had further rightly held in the same paragraph that it would be wrong to suggest that the pleadings which also consisted of the respondent's defence and counterclaim followed by the appellant's reply, the appellant's defence to counterclaim had also been struck out. The appellant argued that the counterclaim was struck out when his original claim was struck out. Notwithstanding the fact that the Court of Appeal did not deliver their grounds of decision, the fact remains that the effect of the Court of Appeal's order when it allowed the appeal, is that it is only the appellant's statement of claim that was struck out and not, the respondent's counterclaim as well.

[11] The notice of application dated 8 November 2013 in encl. 32 is very clear on the reliefs that the respondent is seeking, that is that the writ of summons in encl. 8 and the amended statement of claim in encl. 9 both dated 16 August 2013 be dismissed or struck out. The reasons for both enclosures to be struck out as stated in the application are that the same do not disclose any reasonable cause of action, are scandalous, frivolous, vexatious, and may prejudice, embarrass or delay the fair trial of the action. The application makes no mention of and in fact is not related to the amended statement of defence and counterclaim in encl. 7 and the reply in encl. 10. Thus, clearly the reference in the notice of application to the writ of summons and the amended statement of claim are specific which is accompanied by a specific reference to the relevant enclosure numbers assigned thereto. The appeal before the Court of Appeal is against the dismissal of the application by the High Court to strike out or dismiss these particular pleadings in the action. Accordingly, when the Court of Appeal state in its order dated 14 August 2014 that "appeal is allowed" and "order of the High Court dated 24 December 2013 is hereby set aside" it is in effect allowing the respondent's application to strike out the relevant appellant's pleadings which are found in encls. 8 and 9 on the grounds relied on in the said application. It is therefore the claim of the appellant which has been struck out, not the entire action which also includes encls. 7 and 10. We wish to reiterate at this point that the learned judge rightly pointed out in para. 16 of the grounds of decision that it was incorrect for the appellant to say that after an action was struck out, it meant that the whole pleadings in the action had been struck out and no longer in existence. Had the Court of Appeal intended the present counterclaim to be struck out as contended by the appellant, the Court of Appeal would have specifically ordered that the present counterclaim in encl. 7 to be struck out when the appeal was allowed.

[12] By the aforesaid reasons, it has always been a cardinal principle of law that a counterclaim is treated as a separate and independent action. In the end, the reasons to which we have alluded, considered collectively and as a whole, are sufficient to support our inevitable conclusion that the oral application in respect of the preliminary issue for our determination is completely unsustainable, wholly unmeritorious and was correctly rejected by the learned Judicial Commissioner. In the event, the appeal is dismissed with costs in the cause.